



# COMMONWEALTH of VIRGINIA

Office of the Attorney General

Mark R. Herring  
Attorney General

September 26, 2014

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Mr. James M. Hinshaw  
Mr. Daniel H. Haworth  
Mr. W. Donald Brown  
City of Norfolk Office of Elections  
808 City Hall Building  
Norfolk, Virginia 23510

Dear Messrs. Hinshaw, Haworth, and Brown:

I am responding to your request for an official advisory Opinion in accordance with § 2.2-505 of the *Code of Virginia*.

## Issue Presented

You inquire regarding whether applicable law requires, permits, or forbids the Norfolk Electoral Board from accepting mailed voter registration applications with electronically created signatures.<sup>1</sup> In the context of this inquiry, you express concerns about possible abuses of this new technological process.

## Response

It is my opinion that, although no law requires the acceptance of mailed voter registration applications with electronic signatures, the State Board of Elections is not precluded from directing that general registrars accept such applications, and the State Board, in its discretion, may do so. The State Board also has discretionary authority to establish criteria to preserve the security of confidential voter information and to ensure the authenticity and validity of electronic signatures.

## Background

You express concern regarding a new technology, commonly referred to as an “electronic signature,”<sup>2</sup> that is now being used for voter registration by third-party voter registration organizations.

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<sup>1</sup> This opinion addresses only registration by non-military personnel and military personnel who are stationed in the United States. Registration and voting by overseas military personnel is covered by a separate body of law, the Uniform Military and Overseas Voters Act, VA. CODE ANN. §§ 24.2-451 through 24.2-467 (Supp. 2014).

<sup>2</sup> As applicable to your inquiry, under both federal and Virginia law, an “electronic signature” is defined as “an electronic sound, symbol, or process attached to or logically associated with” a record and “executed or adopted by a person with the intent to sign the record[.]” 15 U.S.C. §§ 7006(5); VA. CODE ANN. § 59.1-480(8) (2006), and “‘Electronic’ means relating to technology having electrical, digital, magnetic, wireless, . . . or similar capabilities, 15 U.S.C. §§ 7006(2); VA. CODE ANN. § 59.1-480(5).

This technology uses the motion of a cursor, finger, stylus, or similar device moved by someone to capture his signature in an electronic device such as a computer, a tablet, or a cell phone. The device then transmits the signature over the Internet to a third party.

When this method is used for voter registration, the signature could be affixed to a registration form filled out by the potential voter on his electronic device, with the completed form then being transmitted to a voter registration organization, but this is not necessarily so. It is also possible for the potential voter to give all information needed to the voter registration organization via telephone so that the organization, rather than the voter, completes the form, with the potential voter then transmitting only his or her electronic signature to the organization. The organization then adds the electronic signature to the thus-completed form, which remains located only on the organization's computer, and which the potential voter has never seen. The completed form then may be printed by the organization and mailed to the appropriate registrar's office. When a registrar receives such a form, it is not initially apparent whether the form was filled in by the voter or by the voter registration organization.

Provided all applicable registration requirements are met, local registrars must register qualified voters upon receipt of the voter registration application.<sup>3</sup> The law does not place any limits on who may submit valid application forms, so an organization mailing in completed applications to register Virginia voters could be located in Virginia, or it could be located anywhere else.<sup>4</sup>

You indicate that the State Board has advised Virginia general registrars to accept such electronic signatures on mailed voter registration applications.<sup>5</sup> The principal concerns you express involve the possible misuse of confidential voter information by voter registration organizations (including possible identity theft) and the ability to verify the authenticity of signatures on such registration applications.

### **Applicable Law and Discussion**

The General Assembly explicitly has provided that the State Board of Elections shall supervise and coordinate the work of the county and the city electoral boards and of the registrars to obtain uniformity in their practices and proceedings and legality and purity in all elections. It shall make rules and regulations and issue instructions and provide information consistent with the election laws to the electoral boards and registrars to promote the proper administration of election laws.<sup>[6]</sup>

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“Electronic” means relating to technology having electrical, digital, magnetic, wireless, . . . or similar capabilities, 15 U.S.C. §§ 7006(2); VA. CODE ANN. § 59.1-480(5).

<sup>3</sup> VA. CODE ANN. § 24.2-417 (2011). *See also* § 1973gg-6(1)(D) of the National Voter Registration Act of 1993, 42 U.S.C. §§ 1973gg through 1973gg-10.

<sup>4</sup> The statute governing voter registration organizations is VA. CODE ANN. § 24.2-416.6 (Supp. 2014). The requirements imposed by this statute are not relevant to your inquiry, for the facts you present involve Virginia activities of a voter registration organization in Oakland, California.

<sup>5</sup> An e-mail about electronic signatures on mail-in registrations dated September 25, 2013 from Justin Reimer, Deputy Secretary of the Virginia Board of Elections to all General Registrars stated, in relevant part, “SBE’s [the State Board of Elections] advice is that general registrars should process these applications.”

<sup>6</sup> VA. CODE ANN. § 24.2-103 (Supp. 2014).

Local electoral boards and registrars shall follow rules and regulations of the State Board insofar as they do not conflict with Virginia law or federal law.<sup>7</sup>

In your request, you specifically ask about the application of the federal Electronic Signatures in Global and National Commerce Act (“ESIGN”),<sup>8</sup> which generally provides that signatures related to certain transactions “may not be denied legal effect, validity, or enforceability solely because it is in electronic form[.]”<sup>9</sup> ESIGN applies only to “transaction[s] in or affecting interstate commerce”<sup>10</sup> and defines “transaction” to mean “an action or set of actions relating to the conduct of business, consumer, or commercial affairs,” to include sales, leases, exchanges and other dispositions of property and services.<sup>11</sup> Because voter registration is civic or governmental in nature, and not “business, consumer or commercial,” I conclude that voter registration is not a “transaction” for purposes of ESIGN, and therefore this federal act does not require Virginia general registrars to accept the applications you describe.<sup>12</sup>

Nevertheless, Virginia has enacted its own statutes governing the use of electronic signatures: the Virginia Uniform Electronic Transactions Act (“UETA”)<sup>13</sup> applies to “electronic signatures relating to a transaction.”<sup>14</sup> Unlike ESIGN, UETA defines “transaction” as “an action or set of actions occurring between two or more persons relating to the conduct of business, commercial, *or government affairs*.”<sup>15</sup> Voter registration is an action relating to government affairs and, therefore, it is a “transaction” for purposes of UETA. UETA’s actual impact, however, is governed by other applicable substantive law and circumstances.<sup>16</sup> Specifically, whether an “electronic signature has legal consequence is determined by [UETA] and other applicable law.”<sup>17</sup> UETA generally provides that, “[i]f a law requires a signature, or provides for certain consequences in the absence of a signature, an electronic signature satisfies the law[.]”<sup>18</sup> however, by its terms, UETA expressly “does not require public bodies of the Commonwealth to use or permit the use of electronic . . . signatures.”<sup>19</sup> Accordingly, I find nothing in UETA that

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<sup>7</sup> *Id.*

<sup>8</sup> Electronic Signatures in Global and National Commerce Act, 15 U.S.C. §§ 7001 through 7031 (2012).

<sup>9</sup> 15 U.S.C. § 7001(a)(1).

<sup>10</sup> 15 U.S.C. § 7001(a).

<sup>11</sup> 15 U.S.C. § 7006 (13).

<sup>12</sup> While ESIGN does not require acceptance of electronic signatures, Congress does have the power to determine the time, place, and manner of conducting federal elections, including the procedures by which votes register to vote in federal elections. *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. \_\_\_\_ (June 17, 2013).

<sup>13</sup> Uniform Electronic Transactions Act, VA. CODE ANN. §§ 59.1-479 through 59.1-498 (2006 & Supp. 2014).

<sup>14</sup> Section 59.1-481(a) (Supp. 2014). Section 59.1-481(b) provides exemptions to UETA not relevant here.

<sup>15</sup> Section 59.1-480(16) (emphasis added).

<sup>16</sup> Section 59.1-481(d).

<sup>17</sup> Section 59.1-483(e) (2006). *See also* Official Comment to the Act, stating in paragraph B, “Whether a record is attributed to a person is left to law outside this Act. Whether an electronic signature has any effect is left to the surrounding circumstances and other law.”

<sup>18</sup> Section 59.1-485(d) (2006).

<sup>19</sup> Section 59.1-496(c) (2006).

specifically requires general registrars to process the voter registration applications about which you inquire.

Although UETA does not require applications featuring electronic signatures to be accepted, the law clearly contemplates that public bodies, such as the State Board of Elections, may accept electronic signatures. In recognizing this authority, UETA provides that

To the extent that public bodies of the Commonwealth use . . . electronic signatures . . . , the following rules apply:

\* \* \* \*

(2) Public bodies of the Commonwealth may specify the type of electronic signature required, the manner and format in which the electronic signatures must be affixed to the electronic record, and the identity of, or criteria that must be met by, any third party used by a person filing a document to facilitate the process.

\* \* \* \*

(4) Public bodies of the Commonwealth may establish other criteria to ensure the authenticity and validity of electronic signatures.<sup>[20]</sup>

Your inquiry concerns registering to vote by mail, which is one of three authorized means by which to register, with the other two being to apply in-person<sup>21</sup> or electronically.<sup>22</sup> Mail registration is governed by Article 3.1 of Title 24.2 of the *Code of Virginia* and related statutes.<sup>23</sup> Although the application must be signed,<sup>24</sup> the statutes do not require signatures to be made in a particular manner.<sup>25</sup> No statute either requires or prohibits the use of electronic signatures for mailed voter registration applications.

As prior Opinions of this Office have articulated, the State Board of Elections, through the Department of Elections, is vested with the administration of the Commonwealth's election laws, and consequently, interpretations of such laws by the Board are entitled to great weight.<sup>26</sup> Therefore, in the absence of a statutory mandate or prohibition providing otherwise, the State Board has the discretion to interpret the signature requirement applicable to voter registration applications submitted by mail to include signatures affixed to application forms by electronic means. I therefore conclude, because the applicable law neither requires nor prohibits the use of electronic signatures on mailed voter registration applications, that the State Board of Elections may direct general registrars to accept and to process

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<sup>20</sup> Section 59.1-496.

<sup>21</sup> See VA. CODE ANN. §§ 24.2-411 through 24.2-412 (2011 & Supp. 2014).

<sup>22</sup> See § 24.2-416.7 (Supp. 2014).

<sup>23</sup> Sections 24.2-416.1 through 24.2-416.6 (2011 & Supp. 2014).

<sup>24</sup> Section 24.2-418

<sup>25</sup> The additional statutory conditions applicable to electronic registration that are contained in § 24.2-416.7, including having certain Department of Motor Vehicles records available for review by the general registrar, do not apply to mailed applications.

<sup>26</sup> See, e.g., 2006 Op. Va. Att'y Gen. 124; 2005 Op. Va. Att'y Gen. 97; 2001 Op. Va. Att'y Gen. 125; 1999 Op. Va. Att'y Gen. 3; 1996 Op. Va. Att'y Gen. 124; 1983-84 Op. Va. Att'y Gen. 140; 1983-84 Op. Va. Att'y Gen. 152.

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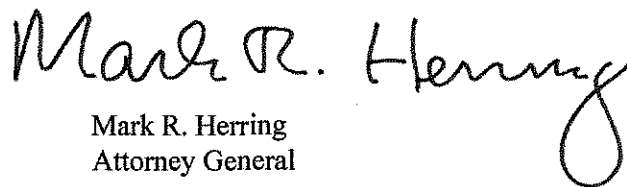
applications containing such signatures.<sup>27</sup> I further conclude that under UETA, the State Board of Elections has authority to adopt reasonable rules in furtherance of the purposes set forth in UETA. Any such actions by the State Board of Elections should be followed by local registrars and electoral boards.

### Conclusion

Accordingly, it is my opinion that, although no law requires the acceptance of mailed voter registration applications with electronic signatures, the State Board is not precluded from directing that general registrars accept such applications, and the State Board may do so. The State Board also has authority to establish criteria to preserve the security of confidential voter information and to ensure the authenticity and validity of electronic signatures.

With kindest regards, I am

Very truly yours,

  
Mark R. Herring  
Attorney General

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<sup>27</sup> I note that permitting the use of electronic signatures does not alter the review process of these applications. The requirements established by Chapter 4 of Title 24.2 of the *Code of Virginia* govern the evaluation of voter registration applications, and to be approved an application also must meet the requirements of Chapter 4, regardless of the manner by which an application is signed.